

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S REPLY  
BRIEF**



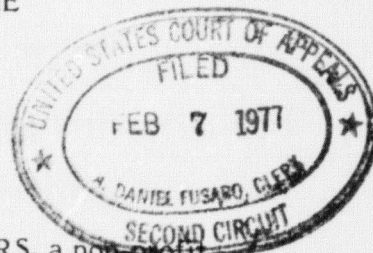


77-6010

REPLY BRIEF FOR CROSS-APPELLEES

UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

\_\_\_\_\_  
No. 77-6010  
\_\_\_\_\_



NATIONAL ASSOCIATION OF COMMODITY OPTION DEALERS, a non-profit  
association, BRISTOL OPTIONS INC., CHARTERED SYSTEMS CORPORATION,  
BRITISH AMERICAN COMMODITY OPTIONS CORPORATION, CLEARY TRADING  
COMPANY, INC., FIRST NEW YORK COMMODITY OPTIONS, LTD., FIRST  
WESTERN COMMODITY OPTIONS, INC. OF LOS ANGELES, WILLISTON  
CORPORATION, LLOYD, CARR AND COMPANY and INTERNATIONAL  
COMMODITY OPTIONS, LTD.,  
PLAINTIFFS-APPELLANTS-CROSS APPELLEES

v.

THE COMMODITY FUTURES TRADING COMMISSION, WILLIAM T. BAGLEY,  
Chairman COMMODITY FUTURES TRADING COMMISSION, JOHN B. RAINBOLT, II,  
Vice Chairman COMMODITY FUTURES TRADING COMMISSION, GARY SEEVERS,  
Commissioner COMMODITY FUTURES TRADING COMMISSION, READ P. DUNN,  
JR., Commissioner COMMODITY FUTURES TRADING COMMISSION and ROBERT  
L. MARTIN, Commissioner COMMODITY FUTURES TRADING COMMISSION,  
DEFENDANT-APPELLEES-CROSS APPELLANTS

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

*Reply Brief*

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Cross Appellees

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| <p>I. The District Court Did Not Abuse Its Discretion<br/>By Preliminarily Enjoining The Enforcement of<br/>Regulation 32.6 Because Plaintiff Showed<br/>Irreparable Injury And Probable Success<br/>On The Merits. ....</p> <p style="padding-left: 40px;">A. The District Court properly found that plaintiffs<br/>had a reasonable likelihood of success in establishing<br/>that defendants acted arbitrarily and capriciously<br/>in proposing the segregation requirements. ....</p> <p style="padding-left: 40px;">B. The District Court properly found that NASCOD<br/>was faced with irreparable injury if a preliminary<br/>injunction was not issued pending full<br/>determination of the action. ....</p> <p>II. The District Court Erred in Granting the Appellees<br/>Summary Judgment As To The Procedural And<br/>Substantive Validity of the Regulations Because<br/>A Genuine Dispute Existed As To A Material<br/>Fact: To Wit: Compliance with 5 U.S.C.<br/>553 (c), (d); 706 (2)(A). ....</p> | <p>4</p> <p>4</p> <p>9</p> <p>13</p> <p>17</p> |
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### ISSUES PRESENTED

- I. Did the District Court abuse its discretion by preliminarily enjoining Regulation 32.6?
- II. Did the District Court err by granting Summary Judgment when genuine material questions of fact were raised as to the procedural and substantive validity of the Regulations?
- III. Did the District Court err by granting the Appellees summary judgment as a matter of law as to the procedural validity of the regulations when the Commodity Futures Trading Commission failed to provide public hearings as required in 7 U.S.C. Section 6c(b) (Supp. V, 1975)?

UNITED STATES COURT OF APPEALS FOR THE  
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No. 77-6010

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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STATEMENT OF THE CASE

NASCOD adopts and incorporates by reference the statement of the  
case set forth in its original brief. This brief constitutes NASCOD's reply brief and  
its brief as cross appellees pursuant to Rule 28, Federal Rules of Appellate  
Procedure. Citations to British American Commodity Options Corporation's brief  
appear as (B.Br. \_\_); to NASCOD's as (N.Br. \_\_); and to the Commission's as  
(C.Br. \_\_). Citation to the record appears as (A. \_\_).



SUMMARY OF ARGUMENT

I.

In order to properly issue a preliminary injunction, a Court must find the plaintiffs have shown irreparable injury and probable success on the merits or that they have raised substantial serious questions which should be litigated and that the equities are in favor of the party seeking relief. On appellate review of a grant of preliminary injunction, the lower Court's finding of fact are to be taken as true unless clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. The fact that an appellate Court may have reached a contrary decision does not warrant reversal, but rather the scope of review is limited to deciding whether the lower Court's decision was an abuse of discretion based on its findings of fact. Under these standards, Judge Knapp's finding that NASCOD sufficiently satisfied the test for a preliminary injunction was not clearly erroneous, and his decision to preliminarily enjoin segregation was not an abuse of discretion.

II.

Summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure should only be granted if the Court finds that there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All ambiguous inferences are to be resolved in favor of the party against whom the motion is made and the moving party has the burden of satisfying the test in Rule 56(c). Under these standards, NASCOD and the other plaintiffs below raised sufficient material factual disputes as to whether the regulations in question were arbitrary and capricious. In part, factual questions were raised concerning the reasonableness and effectiveness of the regulations and their possible violation of 7 U.S.C. Section 19 (Supp. V, 1975). Questions were also raised as to the procedural validity of the regulations. The Commission itself in its brief highlights the factual disputes raised which the Commission argues were properly decided in their favor.



This implicit recognition of factual disputes on genuine issues defeats their claim that summary judgment was proper since the fundamental maxim of summary judgment is that factual questions should not be resolved on a motion for summary judgment. Since factual disputes do exist, which is not denied by the Commission, the Court should never have reached a question of whether the Commission was entitled to judgment as a matter of law, which clearly they were not, and summary judgment was therefore improper. For these reasons the decision to grant summary judgment of the District Court should be reversed.



I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION  
BY PRELIMINARILY ENJOINING THE ENFORCEMENT OF REGULATION 32.6  
BECAUSE PLAINTIFF SHOWED IRREPARABLE INJURY  
AND PROBABLE SUCCESS ON THE MERITS

A. The District Court properly found that plaintiffs had a reasonable likelihood of success in establishing that defendants acted arbitrarily and capriciously in proposing the segregation requirements.

The Court has on many occasions specifically stated what must be shown before a preliminary injunction can be issued. In Sonesta International Hotel Corporation v. Wellington Associates, 483 F.2d 247 (2nd Cir., 1973), this Court said a preliminary injunction will issue, "only upon a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief." Id. at 250. The burden of proving probable success is clearly less under the test if the party seeking relief raises substantial questions going to the merits which are, "so serious, substantial, and different as to make them a fair ground for litigation and thus for more deliberate investigation." Checkers Motors Corporation v. Chrysler Corporation, 405 F.2d 319, 323 (2nd Cir., 1969) cert. den. 394 U.S. 999. Similarly, in Exxon Corporation v. City of New York, 480 F.2d 460 (2nd Cir., 1973), this Court in speaking about the standards for granting or denying a preliminary injunction said if substantial issues are raised and the hardships tipped in favor of the parties seeking relief, then a preliminary injunction is proper, without even using the "irreparable harm" or "probable success" standards. Id. at 464. Finally, in New York Pathological and X-Ray Laboratories, Inc. v. U.S. Immigration and Naturalization Service, 523 F.2d 79 (2nd Cir., 1975) the Court said, "it is not necessary in every case that all four factors mentioned here favor the granting of preliminary relief in order for the Court to issue the injunction "... However, all four factors are relevant considerations for the Court in making a decision." Id. at Footnote 4.



The District Court, in passing upon a Motion for Preliminary Injunction, is called to make factual determinations. Its decision, based upon these findings, will ultimately be within its discretion. Brown and Williamson Tobacco Corporation v. Engman, 527 F.2d 1115 (2nd Cir., 1975); 11 Wright and Miller, Federal Practice and Procedure, Section 2948 (1973). It necessarily follows that appellate review of a discretionary decision of the District Court will be a limited one.

Two components of the decision below are subject to review before this Court. The first is the findings of fact made by Judge Knapp and the second is the ultimate decision drawn from those findings of fact. This Court in Union Management Corporation v. Koppers Company, Inc., 366 F.2d 199 (2nd Cir., 1966) affirmed the District Court's grant of a preliminary injunction and held that the lower Court's finding of fact must be accepted unless clearly erroneous as it must under Rule 52(a) of the Federal Rules of Civil Procedure. Buchanan v. United States Postal Service, 508 F.2d 259 (5th Cir., 1975); 11 Wright and Miller, Federal Practice and Procedure, Section 2962 (1973).

Accepting the facts as found by Judge Knapp, this Court can only reverse Judge Knapp's decision if it finds that the decision was an abuse of discretion. In Brown v. Chote, 411 U.S. 452 (1973), the Supreme Court affirmed a grant of preliminary injunction, stating that on review, an appellate court should, "only consider whether issuance of the injunction constituted an abuse of discretion." Id., at 457. More recently, the Supreme Court in Doran v. Salem Inn, Inc., \_\_\_ U.S. \_\_\_, 95 S.Ct. 2561 (1975) again upheld a grant of preliminary injunction and said, "the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standards, constituted an abuse of discretion." Id., at 2568. This Court has many times enunciated the same scope of review. In Brown & Williamson Tobacco Corporation v. Engman, 527 F.2d 1115, (2nd Cir., 1975), the Court said, "Ultimately, these motions are addressed to the



discretion of the District Court and its decision should not be disturbed unless an abuse of discretion is shown." Id., at 1121. See also 414 Theater Group v. Murphy, 499 F.2d 1155 (2nd Cir., 1974). The reason behind such limited review, as expressed in U.S. Steel Corporation v. Fraternal Association of Steel Haulers, 431 F.2d 1046, (3rd Cir., 1970) is that, "limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing, with the consequence of immediate irreparable injury which could possibly flow from the denial of preliminary relief." Id., at 1048. It follows that an appellate court should not reverse a lower court's decision to grant a preliminary injunction, even if the appellate court would have reached a contrary conclusion unless the District Court's decision was an abuse of discretion. 11 Wright and Miller, Federal Practice and Procedure, Section 2962 (1973).

The stated purpose for the agency's regulations issued on November 24, 1976 (A276) was to ensure minimal customer protection, during an interim, short term period (A-374, SA 11). The principal grounds upon which NASCOD challenged the regulations were that the Commission acted arbitrarily and capriciously within the meaning of 5 U.S.C. 706(2)(A) (1967) and that the regulations were promulgated without due regard to the procedural requirements of 5 U.S.C. 553 (c)(d)(1967). As fully set out herein, the facts in the record clearly justify the District Court in finding that NASCOD had shown possible irreparable harm and possible success on the merits. The District Court's decision to issue a preliminary injunction based on these findings was not an abuse of discretion.

The Commodity Futures Trading Commission (Commission) has stated throughout these proceedings and in their brief (see C.Br. 34-35) that the Commission feels segregation is necessary to protect the investor. Despite the District Court Judge's request of the Commission, the record is silent as to one



single complaint ever received by the agency which would have been prevented by segregation. In an obvious and unprofessional attempt to influence this Honorable Court the Commission cites in its brief (C.Br. 76) several administrative actions it has brought to prevent registration of three firms. This is not part of the record below and, in fact, supports NASCOD's position, in that all three actions are founded on the anti-fraud rule which the Commission has always had available to it (A322). The Commission, despite the fact that it has for a substantial period of time had most of its new regulations available to it, taken no court, administrative or enforcement action against anyone under its new regulations. In fact, at the hearing below the Commission never specifically indicated that it had received any complaints, and it did not bring to Court even one letter or complaint received, nor any affidavit or witnesses to indicate the volume or instance of complaints. It is unclear how, as the Commission has stated (C.BR. 35; SA 15), segregation will prevent fraud, since fraud as defined in Section 32.9 (A-322) is an intent to cheat a customer. Since the customer has paid for the option, the money is no longer his and a dealer's subsequent use of that money would not be fraud.

The Commission further justifies segregation due to their "indisputable history of fraudulent practices and insolvencies by commodity options firms. . ." (C.BR. 37). Yet as previously shown, segregation would in no way prevent one from defrauding a customer. In addition, there is no basis in law to argue that segregation would protect the customer in the event of dealer's insolvency. The Advisory Committee specifically noted, "that the legal efficacy of segregation imposed by regulation is uncertain," (A-157). The Commission has never chosen to explain how a customer could obtain a preferred status over other unsecured creditors in order to get back his investment. It has instead created a legal fiction that customer's money should be treated as belonging to the customer until performance. But no trustee in Bankruptcy or Court appointed receiver would



indulge in such an invalid and unsupportable legal fiction. Judge Knapp questioned the Commission's haste and inquired why they had not sought a change in the Bankruptcy Act. The General Counsel of the Commission responded that that issue could be left to a later determination, but it is just that determination which Judge Knapp was required to make in deciding whether the Commission acted in an ill-considered, arbitrary and capricious manner. If a customer buys an option, receives that option and thus has the benefit of his bargain he cannot also demand a return of his money if a grant or if the option simply chooses not to perform through no fault of the option dealer. The customer must then rely on his legal remedies, but is not entitled to get his money back from an agent who has fully performed. The whole premise upon which segregation is imposed is legally unsupportable and therefore NASCOD's contention that segregation is unreasonable is a valid one.

Contrary to the Commission's position (C.Br. 49-50), it is not enough for an agency merely to decide if a particular course of action is desirable, but rather it must choose those means reasonably designed to effectuate Congressional purpose. National Tire Dealers and Retreaders Association v. Brinegar, 491 F.2d 31 (D.C. Cir., 1974). Congressional purpose in implementing 7 U.S.C. Section 6(c)(b) (Supp. V, 1975) was admittedly to ensure that options transactions be regulated but also that the Commission endeavor to utilize the least anti-competitive means possible. 7 U.S.C. Section 19 (Supp. V, 1975). Several alternatives were offered before the Commission (A-295, 297) (B.Br. 26), all of which were dismissed summarily by the Commission. These alternatives would have been less anti-competitive than segregation and more likely to afford the customer protection the Commission has sought. Even assuming segregation would afford the customer protection that the Commission seeks, it is not necessary to achieve minimal customer protection which is the stated purpose of the regulation. In view of the



fact that the regulations published on November 24, 1976 (A-276) were only to be interim regulations designed to provide minimal protection until contract markets were established and a Congressional mandate to use the least anti-competitive means possible, segregation was clearly excessive and unnecessary. Judge Knapp was justified in drawing the conclusion from the Advisory Report (A-512) that segregation might be totally inappropriate when applied to options dealers since they act merely as agents and not as principals. The Commission's attempt to analogize the position of a futures commission merchant and an options dealer is not convincing. (C.BR. 41).

- B. The District Court properly found that NASCOD was faced with irreparable injury if a preliminary injunction was not issued pending full determination of the action.

NASCOD strongly contends that the effect of segregation will be to force most if not all of its members out of business. The Commission glibly notes that "plaintiff greatly exaggerates the probable effect of this segregation requirement," (A-398) but implicitly recognizes that segregation will in fact force some dealers out of the business (A-281). The Commission offers the suggestion that affected firms can apply for exemption under Section 32.4 (b)(A-399) while refusing at the same time to specifically establish standards for such an exemption. The Commission states that affected parties must offer an alternative to segregation yet many alternatives already offered have been dismissed by the Commission (A-295, 297). To date, the Commission has not approved one alternative plan. Without proper standards by which a court can determine whether an individual was wrongly refused an exemption, the relief suggested by the Commission (A-399) is illusory.

The Commission totally misunderstands the purpose which a preliminary injunction serves. The Commission implies (C.Br. 44-46) that Judge Knapp has held that segregation is invalid because its effect will force members of NASCOD



out of business. Clearly, all Judge Knapp has done is indicate his belief that NASCOD members face irreparable harm if a preliminary injunction is not issued pending the final determination of the merits of this suit. The Commission itself has recognized the possibility that certain firms will go out of business due to the segregation requirement (C.Br. 45) which is exactly what Judge Knapp concluded (A-514). It clearly was not an abuse of discretion for the court to find that NASCOD members were threatened with irreparable injury when the Commission itself, in uncharacteristic candor, admits that fact. (C.Br.-45). One cannot seriously argue that the threat of being deprived of one's livelihood and of being forced out of business is not irreparable injury.

The Court's finding of fact upon which it based its decision that NASCOD members would be irreparably injured if a preliminary injunction was not issued is not clearly erroneous. The Commission does not dispute the fact that segregation will require at a bare minimum for most businesses, obtaining loans to put up the money to be segregated. The Court's finding that bank financing was not feasible is not clearly erroneous. The Commission obfuscates the practical difficulty of obtaining such a loan by comparing relative interest rates (C.Br. 48). The Commission has specifically stated that segregated funds cannot be collateralized. To allow such a subordination of a customer's interest in the fund would be to negate its purpose, in the opinion of the Commission. It must be obvious to this Court, as it was to Judge Knapp that it is extremely doubtful that a financial institution would be willing to give the required loans on an unsecured basis. The Commission has not denied the harsh realities of the negative cash flow resulting from segregation (B.BR.-23), and has never demonstrated that it has actually studied the problems of bank financing. One would assume that a responsible agency, before promulgating such a harsh regulation, would have first investigated the probability of bank financing. The agency's refusal to make such

an investigation or even seriously consider the problem is further evidence of the Commission's cavalier attitude and arbitrary and capricious action. NASCOD's allegation that its members will be forced out of business has been recognized as an irreparable injury justifying a grant of preliminary injunction. In New York Pathological and X-Ray Laboratories, Inc. v. U.S. Immigration and Naturalization Service, supra., the plaintiff's allegation was merely that there would be a reduction of profits and not the total loss of its business as is alleged by NASCOD. This Court held that the loss alleged could not be remedied at the time of a trial on the merits and therefore was sufficient irreparable injury to justify preliminary injunction. Similarly, in Doran v. Salem Inn, Inc., supra., the Supreme Court accepted, as sufficient, an allegation that the challenged ordinance would result in plaintiff's bankruptcy. The Court was clear to point out that the defendants did not challenge plaintiff's allegation. In the instant case, the Commission has on several occasions (B.Br. 24 footnote) (C.Br. 45)(A-281) agreed that segregation will force many small dealers out of business. Clearly, Judge Knapp did not abuse his discretion by granting a preliminary injunction based on his finding that NASCOD was threatened with irreparable injury. It takes only common sense to realize the practical effect of the segregation requirement and it cannot be seriously doubted as Judge Knapp recognized (A-514), that many businesses operating under such a requirement could not stay in business very long, if at all.

The Commission overlooked the fact that NASCOD fully satisfied the alternative test for a preliminary injunction enunciated in Sonesta International Hotels Corporation v. Wellington Associates, supra. Although the Court did not fully rely on this, Judge Knapp could have granted a preliminary injunction based on the finding that NASCOD and British American Commodity Options Corporation clearly raised sufficient serious questions going to the merits and the balance of



hardships tipped towards them.

The threat of immediately being forced out of business for many of the plaintiffs as compared with the alleged benefits of an ineffectual, and illegal segregation requirement, particularly when the Commission has a full arsenal of other regulations, should have weighed the scales heavily in favor of the plaintiffs. By denying the Commission's motion for a summary judgment on segregation the Court implicitly recognized that there were serious issues to be fully litigated. The Court also found that NASCOD and British American Commodity Options Corporation were faced with the threat of irreparable injury and, ". . . in light of the wide panoply of regulations already and about to be in effect, that the public interest will not be adversely affected by preliminarily enjoining these segregation requirements." (A514). It should be emphasized that the Commission has never offered an example of a customer complaint that would have been prevented by segregation or that could not have been remedied by the other regulations. In point of fact, the Commission cannot prove that the bankruptcy of J. S. Love Associates which they heavily rely on, would have been prevented, or the investor's interests protected by segregation. That case involved fraud and occurred before any registration, disclosure, or working capital requirements existed. The Commission writes, ". . . J. S. Love Associates were placed into bankruptcy which appeared likely to result in substantial losses. . ." (emphasis is added) (C.Br. 37). None of the cases cited by the Commission (C.Br. 38) as its "considerable enforcement experience" would have been remedied by segregation and the Commission has never sought to have any customer's funds returned despite the fact that two of the firms referred to are still in business and are able to refund customer's money; one of the firms was not put into bankruptcy and could have been forced to refund money; and the fourth firm, J. S. Love Associates, was forced into bankruptcy primarily by the action of the Attorney General of New York, rather than having it placed into a receivership where funds could have been



made available to customers through the exercise of outstanding options. Furthermore, the Commission has at its disposal a broad anti-fraud provision (A-322) which will provide sufficient protection to the public pending the determination of this action. It is obvious that the hardships in this case support a finding in NASCOD's favor and, having raised substantial serious questions going to the merits, NASCOD was entitled to a preliminary injunction on this ground as well. Clearly, the Court did not abuse its discretion by granting a preliminary injunction and having not abused its discretion, the Court's decision should be affirmed.

Finally, the Commission itself must recognize the weakness of its position since it has not refuted any of appellant's allegations in its brief, with the exception of irreparable injury, the legal standards for granting a preliminary injunction. Nowhere in the Commission's brief do they address themselves to the scope of review in this appeal. As previously shown, appellate review in this proceeding is limited to accepting findings of fact unless clearly erroneous, and accepting the lower Court's decision even if this Court would have reached a contrary result unless Judge Knapp's decision was an abuse of discretion. Since the Commission totally failed to prove the public would be harmed in any way without segregation and having implicitly recognized that some dealers would be forced out of business, there was an adequate basis from which the Court could grant a preliminary injunction.

**II. THE DISTRICT COURT ERRED IN GRANTING THE APPELLEES  
SUMMARY JUDGMENT AS TO THE PROCEDURAL AND SUBSTANTIVE  
VALIDITY OF THE REGULATIONS BECAUSE A GENUINE DISPUTE  
EXISTED AS TO A MATERIAL FACT: TO WIT: COMPLIANCE WITH  
5 U.S.C. 553 (c), (d); 706 (2)(A)**

The lower Court erred when it granted the Commission's motion for summary judgment as to the balance of the regulations in question since factual



questions were raised which preclude summary judgment. The Commission in that portion of their brief (C.Br. 57-78) responding to NASCOD's original brief, does not refute NASCOD's contention (N.Br. 12-25), that factual questions were raised in the court below.

NASCOD reasserts its position (N.Br. 16-17) that the regulations were promulgated in violation of the Congressional mandate found in 7 U.S.C. 6(c)(b) (Supp. V, 1975), that rules and regulations concerning options transactions be promulgated, "only upon such notice and opportunity for hearing." The Commission's reliance upon U. S. v. Florida East Coast Railway Company, 410 U.S. 224 (1973) is misplaced. In the present case, Congress in the Commodity Futures Trading Commission Act of 1974 invested the Commission with regulatory power over option transactions but conditioned this on prior opportunity for hearing. Section 6(c)(b) was not necessary in light of the existing authority of the agency under 7 U.S.C. 12(a)(5)(Supp. V, 1975) to promulgate rules if Congress had intended that the Commission need only adhere to those procedures required under 5 U.S.C. 553 (c)(1967). In U.S. v. Florida East Coast Railway Company, *supra.*, the Court was not faced with a specific Congressional mandate that rules promulgated under a specific category of the statute be made only after a hearing and in addition the Court itself recognized, "a statute that requires a hearing prior to rule making may in some circumstances be satisfied by procedures that meet only the standards of Section 553." (emphasis added) *Id.* at 241. This case is an example of a situation which the Court recognized that "after a hearing" would require more than the minimum procedures required by Section 553. If the Commission's interpretation of 7 U.S.C. 6(c)(b) (Supp. V, 1975) is accepted, then the proviso in Section 6(c)(b) would be read out of the statute which violates fundamental principles of statutory construction. U.S. v. Blausius 397 F.2d 203 (2nd Cir., 1968) *cert. dismissed*. 393 U.S. 1008 (1969); U.S. v. Dinnerstein, 362 F.2d 852 (2nd Cir., 1966).



NASCOD strongly contends that factual questions exist as to whether the Commission adequately sets forth "good cause" to justify implementing the regulations prior to the thirty (30) day period required by 5 U.S.C. 553 (d) (1967). The Commission takes the incredible position (C.Br. 61) that a Court is entitled to accept at face value an agency's statement of good cause without determining in fact whether good cause existed. Such a position would emasculate the requirements of Section 553 (d). The Commission cites Lewis-Mota v. Secretary of Labor 469 F.2d 478 (2nd Cir., 1972) as authority for the proposition that this issue is moot since thirty (30) days have passed. The Commission would have this Court expand its narrow holding in Lewis-Mota v. Secretary of Labor, supra., to a broad rule that violations of Section 553 (d) cease to be violations after thirty days of publication in all cases. In Lewis-Mota, supra., the Court required that affected individuals be allowed to reapply under conditions as if the regulations had been validly promulgated. In the instant case, there can be no restoration of rights to put plaintiffs back in the same position they would have been in had the Commission followed the law. At least one NASCOD member has totally been put out of business and several others have been irreparably damaged by not being able to operate their business for many weeks - thereby losing customers, employees and profits. Some of these companies may now never be able to re-open. The facts in this case clearly do not warrant an extension of the holding in Lewis-Mota v. Secretary of Labor, supra.

NASCOD has not urged below or before this Court that 7 U.S.C. Section 6(c)(b) (Supp. V, 1975) is invalid because of an improper delegation of legislative authority (C.Br. 64). Rather, NASCOD contends that the absence of standards imposed upon the agency, the responsibility of promulgating clear and precise standards in order to satisfy the delegation doctrine and to allow for meaningful judicial review of those regulations. Given this added responsibility, it cannot be



seriously doubted that factual questions were raised below about whether the Commission acted arbitrarily and capriciously in promulgating the regulations. The Commission concedes that factual questions were raised, but argues that the District Court properly found those facts in their favor. However, it is clear that once factual questions are raised, summary judgment must be denied. U.S. v. Bosurgi 530 F.2d 1105 (2nd Cir., 1976).

The Commission further erroneously argues that NASCOD's position is that the regulations are unnecessary because the Commission's anti-fraud rule is sufficient. (C.Br. 66). NASCOD has never taken this position but rather takes the position that the scope of the regulations adopted are unreasonable and unnecessary. If reasonable regulations were adopted, competitive equality with the futures industry would still be possible, but the regulations as they exist now will force many dealers out of business.

The Commission itself by trying to justify the lower Court's grant of summary judgment (C.Br. 69-77) demonstrates that factual questions exist as to whether the regulations are arbitrary and capricious. The basis for the extensive disclosure requirement is based on the Commission's belief that "a significant number of commodity options have been and are being sold through the use of high pressure sales tactics to persons unfamiliar with the commodity markets generally, and commodity options in particular." (C.Br. 69). This premise and other objections to regulation 32.5 raised factual questions inappropriate for decision on a motion for summary judgment. Heyman v. Commerce and Industry Insurance Company 524 F.2d 1317 (2nd Cir., 1975). The Commission again demonstrates that genuine questions of fact exist on the question of the computation for the net capital requirement under regulation 1.17 (C.Br. 73) which would largely determine the reasonableness of 1.17. Resolution of this dispute on a motion for summary

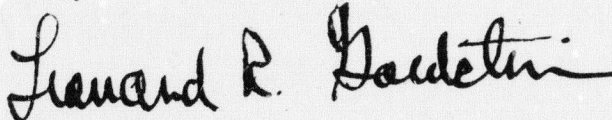
judgment was error.

Throughout their brief, the Commission has ignored the basic principles of summary judgment. Under Rule 56 (c) Federal Rules of Civil Procedure, summary judgment is only proper when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. The burden is on the moving party, Adickes v. S. H. Kress and Company 398 U.S. 144 (1970) and the Commission clearly failed to sustain its burden. Rather, the Commission's brief itself shows that factual questions exist as to whether the regulations are arbitrary and capricious. The Commission has not chosen to show that no factual questions exist since it clearly cannot. For the reasons herein, the District Court erred by granting the Commission's motion for summary judgment.

CONCLUSIONS

WHEREFORE, NASCOD respectfully urges this Court that it affirm the District Court's decision to preliminarily enjoin the segregation requirement; reverse the District Court's denial of a preliminary injunction on the other regulations; reverse the decision of the District Court granting summary judgment; and remand the case for trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Leonard R. Goldstein".

Leonard R. Goldstein  
Attorney for  
Plaintiffs - Appellants  
Cross Appellees



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing reply brief and cross appellees' brief have been delivered to Charles J. Hecht, counsel for British American Commodity Option Corp., and Frederic T. Spindel, counsel for the Commodity Futures Trading Commission this \_\_\_\_ day of February, 1977.

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LEONARD R. GOLDSTEIN